Supreme Court, U.S.
FILED
JUL 21 2009
OFFICE OF THE CLERK

No. 08-1584

IN THE
Supreme Court of the United States

VALUEPEST.COM OF CHARLOTTE, INC., FKA BUDGET PEST PREVENTION, INC., *ET AL.*,

Petitioners,

v.

BAYER CORPORATION, BAYER CROPSCIENCE, L.P., AND BASF CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DOUGLAS W. EY, JR.
CATHERINE E. THOMPSON
JASON D. EVANS
McGUIREWOODS LLP
100 North Tryon Street
Suite 2900
Charlotte, NC 28202
(704) 343-2076

GLEN D. NAGER
(*Counsel of Record*)
PHILLIP A. PROGER
LAWRENCE D. ROSENBERG
L. TRAMMELL NEWTON, JR.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Fourth Circuit correctly held that Respondents' agency arrangements with retailers were genuine, such that Petitioners failed, as a matter of law, to establish the "contract, combination ... or conspiracy" element of a claim under Section 1 of the Sherman Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents make the following disclosures:

Respondent Bayer Corporation: Bayer AG is the parent corporation of, and wholly owns, respondent Bayer Corporation.

Respondent Bayer CropScience, L.P.: Bayer AG indirectly owns respondent Bayer CropScience, L.P., as follows: Bayer CropScience, L.P. is a Delaware limited partnership owned by two limited partners, BayerCropScience LLC ("BCSLLC") and Bayer CropScience, Inc. ("BCSI"), and a general partner, Bayer CropScience Holding Inc. ("BCHI"). BCSLLC is wholly owned directly by co-respondent Bayer Corporation, which is wholly owned by Bayer AG. BCSI and BCHI are both wholly owned by Bayer CropScience Holding, SA, which is wholly owned by Bayer CropScience AG, which is also wholly owned by Bayer AG.

Respondent BASF Corporation: Respondent BASF Corporation is a wholly owned subsidiary of BASF Americas Corporation. BASF Americas Corporation is a wholly owned subsidiary of BASFIN Corporation. BASF Corporation, BASF Americas Corporation, and BASFIN Corporation are all Delaware corporations. BASFIN Corporation is a majority owned subsidiary of BASF Nederland BV, a Dutch limited liability company, which in turn is a wholly owned subsidiary of BASF SE (Societas Europaea – "SE"), a publicly traded European Company. BASF Corporation, BASF Americas Corporation, BASFIN Corporation and BASF Nederland BV are not publicly held.

BASF SE is the successor to BASF Aktiengesellschaft. The transformation of BASF

Aktiengesellschaft into a European Company (Societas Europaea, SE), was officially completed on January 14, 2008 with the entry of the name in the commercial register of the Ludwigshafen district court, which thus rendered the company's name BASF SE.

TABLE OF CONTENTS

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

RESPONDENTS' BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

I. THE FOURTH CIRCUIT CORRECTLY APPLIED THIS COURT'S CONTROLLING PRECEDENTS 4

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS TO BE ADDRESSED 6

III. PETITIONERS' PENDING CHALLENGE TO THE FINALITY OF THE DISTRICT COURT'S UNDERLYING JUDGMENT ALSO COUNSELS AGAINST A GRANT OF CERTIORARI 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 4

Day v. Taylor, 400 F.3d 1272 (11th Cir. 2005) 7

Hardwick v. Nu-Way Oil Co., Inc., 589 F.2d 806 (5th Cir. 1979) 7

Illinois Corp. Travel, Inc. v. Am. Airlines, Inc., 889 F.2d 751 (7th Cir. 1989) 7

Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007) 5

Mesirow v. Pepperidge Farm, Inc., 703 F.2d 339 (9th Cir. 1983) 7

Morrison v. Murray Biscuit Co., 797 F.2d 1430 (7th Cir. 1986) 7

Ozark Heartland Elecs. Inc. v. Radio Shack, 278 F.3d 759 (8th Cir. 2002) 7

Simpson v. Union Oil Co. of California, 377 U.S. 13 (1964) 2, 4

Toledo Mack Sales v. Mack Trucks, 530 F.3d 204 (3d Cir. 2008) 6

United States v. General Electric Co., 272 U.S. 476 (1926) 2, 4

FEDERAL STATUTES

15 U.S.C. § 1 4

15 U.S.C. § 15(a) 4

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Bayer Corporation and Bayer CropScience, L.P. (collectively "Bayer") and BASF Corporation ("BASF") hereby respond in opposition to the Petition for a Writ of Certiorari filed by Petitioners on June 22, 2009. In the decision below, the United States Court of Appeals for the Fourth Circuit applied the well-established law on agency and consignment arrangements under Section 1 of the Sherman Act in a manner consistent with the controlling precedents of the Court and consistent with the decisions of other circuits. There is no issue that justifies granting a Writ of Certiorari.

STATEMENT OF THE CASE

1. Respondents adopt the statement of facts set forth in the Fourth Circuit's opinion below, (Pet. App. 4-7), but briefly summarize the relevant background.

In 1996, Bayer introduced Premise, an advanced non-repellent termiticide. (Pet. App. 4). Initially, Bayer sold its products to distributors, including Univar USA, Inc., one of the largest distributors of termiticides to pest management professionals (PMPs). (*Id.*). In 2000, Aventis CropScience, L.P. introduced Termidor, a competing non-repellent termiticide. (*Id.*). Soon after introducing Termidor, Aventis began distributing its product pursuant to non-exclusive agency agreements. (Pet. App. 4-5). Under those agreements, Aventis retained title until the product was sold to PMPs, set the retail price at which it would sell its product, and paid commissions to the selling agents (Pet. App. 5). Several distributors preferred the agency relationship due to its profitability, and expressed unhappiness with Bayer's distribution arrangement. (*Id.*). Fearing the

lost sales that would result if distributors chose to encourage Termidor sales over Premise sales, Bayer switched to a similar agency distribution model in January 2001. (*Id.*).

In October 2001, Bayer announced a plan to purchase all shares of Aventis. (Pet. App. 6). The FTC permitted the acquisition, but required Bayer to divest assets related to Termidor's active ingredient. (*Id.*). BASF acquired those assets in March 2003 and since that time has manufactured and sold Termidor in the United States. (*Id.*). Bayer ceased selling Premise via agency agreements in 2005, while BASF continues to sell Termidor pursuant to that model today. (*Id.*).

On April 25, 2005, Valuepest filed a putative class action lawsuit in the Western District of North Carolina, alleging that the agency relationships between Bayer and BASF, and their respective distributor agents, constituted vertical price fixing under Section 1 of the Sherman Act. (*Id.*). The parties agreed that the vertical price fixing claims would be resolved with respect to Univar, and that the resolution of the Univar claim would "set the framework for resolution of Plaintiffs' claims against Defendants with regard to all of their individual distributors." (Pet. App. 6 & n.1). The District Court found that Bayer's and BASF's respective agency relationships were genuine, and that Bayer and BASF therefore could not be held liable for vertical price fixing under Section 1. (Pet. App. 7, 35-36, 49-50) (citing *United States v. General Electric Co.*, 272 U.S. 476 (1926), and *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964).) The District

Court thus entered summary judgment as to all claims. (Pet. App. 52)

On March 24, 2009, the Fourth Circuit affirmed. (Pet. App. 3). The court of appeals found "unconvincing [Petitioners'] various arguments that the agency agreements at issue in this case were shams," and held that, "[b]ecause the agency relationships between defendants and Univar were genuine, neither defendant violated § 1 [of the Sherman Act]." (Pet. App. 24.)

2. In their Petition for Certiorari, Petitioners assert that they have "established" certain points related to market definition, market share, and the weight of pro-competitive versus anti-competitive effects – matters that would be relevant to an antitrust rule of reason analysis – as well as an alleged overcharge. (Pet. 4-5.) Petitioners' assertions are simply not correct. Because the District Court found the agency relationships to be genuine and granted summary judgment in favor of Bayer and BASF on that basis, which the Fourth Circuit affirmed, the courts below have not addressed any of these points. When this action was pending in the District Court, Petitioners' expert did not offer an opinion on any rule of reason points that Petitioners now contend were established. Moreover, even though Plaintiffs did not place the question at issue, there was evidence that the agency relationships here had pro-competitive effects, including expert reports, indicating that prices went *down* for a great majority of consumers once the agency relationships were formed. Thus, the points that Petitioners claim are "established" in fact are disputed by Bayer and

BASF, and those issues have never been ruled on by any court.

3. Simultaneously with seeking a Writ of Certiorari, Petitioners have continued to litigate this case below. After the Fourth Circuit's decision affirming the judgment in favor of Bayer and BASF, Petitioners filed a motion in the District Court seeking relief from the judgment pursuant to Federal Rule Civil Procedure 60. The District Court denied that motion, and Petitioners have appealed that denial. Petitioners' second appeal of this matter to the Fourth Circuit remains pending at this time.

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT CORRECTLY APPLIED THIS COURT'S CONTROLLING PRECEDENTS

To prevail on a cause of action for a violation of Section 1 of the Sherman Act, a plaintiff must prove a "contract, combination . . . or conspiracy" that constitutes an unreasonable restraint of trade. 15 U.S.C. § 1. A private plaintiff must additionally prove antitrust injury. 15 U.S.C. § 15(a).

This Court held in *United States v. General Electric Co.*, 272 U.S. 476 (1926), and reaffirmed in *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964), that a genuine agency or consignment relationship defeats the "contract, combination . . . or conspiracy" element of the Sherman Act Section 1 claim. A principal and its agent cannot conspire for antitrust purposes, just as an employer and its employee cannot so conspire, and as a parent corporation and its subsidiary cannot so conspire. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), the Court addressed the different question of whether a *per se* or rule of reason analysis applies to minimum resale price maintenance claims properly asserted under Section 1 of the Sherman Act. *Leegin* requires a plaintiff who asserts a minimum resale price maintenance claim to meet the more burdensome rule of reason standard in order to satisfy the restraint of trade element. *Leegin* did not address, and did not affect, the law on the "contract, combination . . . or conspiracy" element; indeed, it did not even mention this Court's prior decision in *General Electric*, let alone overrule or modify it.

Contrary to Petitioners' argument, there is no conflict between *General Electric* and *Leegin*. As the Fourth Circuit correctly explained, "*General Electric* addressed what types of relationships constitute agreements to set prices for purposes of the Sherman Act, while *Leegin* concerned whether such agreements, once proven, should be considered per se unlawful or evaluated for their reasonableness. The structure of § 1 of the Sherman Act makes the different focus of the two decisions clear." (Pet. App. 7-8.)

Bayer and BASF moved for summary judgment on the basis that their respective agency relationships were genuine, defeating the "contract, combination . . . or conspiracy" element as a matter of law. Because the District Court found the agency relationships to be genuine and granted summary judgment in favor of Bayer and BASF on that basis, which the Fourth Circuit affirmed, the lower courts had no reason to "apply *Leegin*" (Pet. 8) in any

respect. The Fourth Circuit's decision is entirely consistent with this Court's controlling precedent in *General Electric*.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS TO BE ADDRESSED

Petitioners also contend that the Fourth Circuit's decision below conflicts with the Third Circuit's decision in *Toledo Mack Sales v. Mack Trucks*, 530 F.3d 204, 224 (3d Cir. 2008). There is no conflict, because *Mack Trucks* did not involve an agency or consignment arrangement within the purview of *General Electric*.

The issue before the Third Circuit in *Mack Trucks* was whether the plaintiff had presented sufficient evidence of a territory allocation agreement between a truck manufacturer and its dealers and a separate agreement among the dealers themselves to avoid a directed verdict on the plaintiff's Sherman Act Section 1 claim. *Mack Trucks*, 530 F.3d at 218-24. Indeed, the Third Circuit carefully distinguished the two distinct "requirements" that must be established in an antitrust case: (1) showing an agreement (*i.e.*, the issue in the instant matter); and (2) establishing that the agreement "imposed an unreasonable restraint on trade" (*i.e.*, the issue raised in *Leegin*.) *See* 530 F.3d at 218. As precedent dictates, the Third Circuit addressed *Leegin* only *after* it found the plaintiffs' evidence was sufficient to allow a jury to find that the "combination, contract . . . or conspiracy" element was satisfied.

The Third Circuit's application of *Leegin* in *Mack Trucks* thus has no bearing on this case. *Mack Trucks* does not address Petitioners' argument here—*i.e.*, whether *Leegin* modified this Court's case law for

determining whether the agency relationships are genuine such that there is no "contract, combination . . . or conspiracy" as a matter of law. The Fourth Circuit's decision below is consistent with the decisions of other circuits that have addressed the genuineness of agency and consignment relationships. *See Day v. Taylor*, 400 F.3d 1272 (11th Cir. 2005); *Ozark Heartland Elecs. Inc. v. Radio Shack*, 278 F.3d 759 (8th Cir. 2002); *Illinois Corp. Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986); *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339 (9th Cir. 1983); *Hardwick v. Nu-Way Oil Co., Inc.*, 589 F.2d 806 (5th Cir. 1979). Thus, there is no conflict among the circuits for the Court to address.

III. PETITIONERS' PENDING CHALLENGE TO THE FINALITY OF THE DISTRICT COURT'S UNDERLYING JUDGMENT ALSO COUNSELS AGAINST A GRANT OF CERTIORARI

Apart from Petitioners' inability to identify either a legal error in the Fourth Circuit's decision, or a circuit split on the question presented, certiorari should also be denied due to the Plaintiffs ongoing attempt to reopen, via Federal Rule of Civil Procedure 60, the very judgment for which it currently seeks certiorari review.

During the District Court proceedings, the parties recognized that Bayer's and BASF's agency relationships with all of their distributors involved common issues of law and fact, and the "parties recognized the desirability of taking one contract at issue (Univar) and determining whether or not it was an unlawful restraint of trade or a lawful agency

relationship." (App. 3a). The District Court concluded that the Univar relationships were lawful agency relationships and granted summary judgment as to all claims. (*Id.*).

The matter was appealed to the Fourth Circuit as a final judgment (not as an interlocutory appeal). *Id.* After briefing and argument in the Fourth Circuit, and days before the Fourth Circuit ultimately issued its decision, Petitioners asked the Fourth Circuit to stay the proceedings and remand for a "clarification" of the scope of the summary judgment order. (App. 5a). The Fourth Circuit declined to stay its proceedings, and affirmed the dismissal of Petitioners' claims in their entirety. *Id.*

Thereafter, Petitioners sought to reopen the judgment in the District Court pursuant to Rule 60. The motion to reopen was denied. (App. 5a). On June 10, 2009, Petitioners appealed to the Fourth Circuit. (App. 7a-8a). The case currently remains pending in the Fourth Circuit, as Fourth Circuit Docket No. 09-1663.

As this procedural history illustrates, Petitioners now find themselves in the unusual position of seeking Supreme Court review of a final judgment while simultaneously attacking the finality and scope of that judgment in the Fourth Circuit. This unusual procedural posture further counsels against certiorari review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS W. EY, JR.
CATHERINE E. THOMPSON
JASON D. EVANS
McGUIREWOODS LLP
100 North Tryon Street
Suite 2900
Charlotte, NC 28202
(704) 343-2076

GLEN D. NAGER
(*Counsel of Record*)
PHILLIP A. PROGER
LAWRENCE D. ROSENBERG
L. TRAMMELL NEWTON, JR.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondents

July 27, 2009